

**SANITIZED DEC. 04-720 P – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 2/3/05 – ISSUED 2/9/05**

SYNOPSIS

PERSONAL INCOME TAX – BURDEN OF PROOF NOT MET – Premature withdrawal of monies from a retirement fund account triggers taxation of same regardless of whether only one of the two Petitioners was aware that such had occurred, because Petitioners had filed a joint West Virginia personal income tax return for the year in question.

FINAL DECISION

The Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a personal income tax assessment against the Petitioners. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for the year 2001, for tax, interest, through September 10, 2004, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked November 10, 2004, one of the Petitioners, the husband, timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioners and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioners filed a joint West Virginia personal income tax return for tax year 2001 and did not include therein the income from a self-employment retirement (“SEP”) fund account.

2. Petitioner’s wife testified that she was the one who, without the knowledge of her husband, withdrew the retirement account monies, thereby triggering the taxation of same.

3. Petitioners testified that they realize now that the premature withdrawal of the SEP makes them subject to West Virginia personal income tax.

DISCUSSION

The only issue is whether the Petitioners have shown that the assessment is incorrect and contrary to law, in whole or in part.

In this case, Petitioners have admitted that the premature withdrawal of the SEP made them liable for personal income tax regarding same.

Said liability attaches regardless of whether one of the Petitioners was aware of the withdrawal at the time that it was made, because Petitioners filed a joint West Virginia personal income tax return for the year in question.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. In light of the foregoing discussion, the Petitioners-taxpayers in this matter have failed to carry the burden of proof with respect to the issue of whether the premature withdrawal of monies from a retirement account should not be taxable because one of the Petitioners was unaware of same at the time it was made. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for the year 2001 should be and is hereby **AFFIRMED** as to the tax and interest, for a **total** liability; the **ADDITIONS** to tax are, however, **VACATED** in full.